

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 23, 2008

IN RE D.A.P.

**Appeal from the Juvenile Court for Knox County
No. 31110 Timothy E. Irwin, Judge**

No. E2007-02567-COA-R3-PT - FILED JULY 9, 2008

The issues presented in this case are whether the trial court erred in terminating the mother's parental rights to her child upon a determination that the mother was mentally incompetent to care for her child and whether termination was in the best interest of the child. After careful review, we hold that the evidence does not preponderate against the trial court's finding that there was clear and convincing evidence of the mother's mental incompetency to care for the child pursuant to Tenn. Code Ann. § 36-1-113(g)(8)(B) and that termination was in the child's best interest. Accordingly, we affirm the judgment of the juvenile court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Heather G. Inman, Knoxville, Tennessee, for the Appellant, D.M.P.

Robert E. Cooper, Jr., Attorney General and Reporter, and Elizabeth C. Driver, Senior Counsel, Nashville, Tennessee, for the Appellee, State of Tennessee, Department of Children's Services.

OPINION

I. Background

In this appeal, we address the termination of parental rights of D.M.P. ("Mother") to her fourth child, D.A.P. ("Child"), who was born on March 29, 2007. Mother was in custody in Knox County on charges of aggravated assault, aggravated arson, and vandalism when she went into labor with Child. The day after Child was born, on March 30, 2007, the Tennessee Department of Children's Services ("DCS") filed a petition for temporary custody of Child in the Knox County Juvenile Court. Following a hearing, an agreed order was entered finding Child to be dependent and

neglected due to Mother's untreated and possibly untreatable mental illness and her commitment to a psychiatric hospital. Child was placed in the temporary custody of DCS, effective March 29, 2007.

Upon being discharged from the hospital following Child's birth, Mother was admitted to Lakeshore Mental Health Institute ("Lakeshore") for treatment. Mother had a history of hospitalizations for mental health issues beginning in 1997 when she was only 15 years old. Mother has been diagnosed with a schizoaffective disorder and mild mental retardation. Mother's parental rights to three other children had previously been terminated.

While Mother was hospitalized at Lakeshore, a DCS case manager was only able to visit Mother twice due to her volatile mental state. On the first visit on April 27, 2007, Mother was incoherent. On the second visit on May 17, 2007, the case manager spoke with Mother about the identity of Child's father, and Mother inquired about Child. After some investigation, Child's father was identified; DCS entered into a permanency plan with the father; and at the time of final hearing, DCS had not filed a petition for termination of father's rights.

On April 24, 2007, DCS filed a petition for termination of Mother's parental rights to Child in the Knox County Juvenile Court. Following a trial on October 19, 2007, the trial court issued an order terminating Mother's parental rights finding that Mother was incompetent to adequately provide for the care and supervision of Child because Mother's mental condition was so presently impaired and was so likely to remain impaired that it was unlikely that Mother will be able to assume the care of and responsibility for Child in the near future. The trial court referenced its findings in the previous termination case involving two of Mother's other children on May 17, 2006; these findings provide a good overview of Mother's troubled past:

It is undisputed that [Mother] has a quite extensive history of mental illness including numerous incidents of violence, self-injurious behavior and psychiatric hospitalizations. This is complicated by mental retardation contributing to very poor impulse control and judgment. As early as 1997, the Court found that she

is a child 15 years of age who is severely mentally handicapped due to the mental illness and the mental retardation, who suffers from psychosis and depression. She experiences extreme mood swings and has hallucinations both auditory and visual. She engages in severe promiscuity, self-mutilation, and is assaultive and physically destructive. She is delusional and often has severe problems with peers. Her conduct continues in spite of being on psychotropic medications. She has been violent and homicidal toward her grandmother, her guardian.

Since then she has been hospitalized at Lakeshore Mental Health Institute on four occasions (including her current hospitalization), has been hospitalized at Peninsula,¹ and has received out-patient medication and case management services through Helen Ross McNabb.² Her diagnoses include major depressive disorder with psychotic features, schizophrenia, and mild mental retardation. Despite efforts to stabilize her condition she continues to have unpredictable episodes of aggression and threats of self-harm as well as psychotic symptoms which trigger agitation and more destructive impulses. If she were currently outside a hospital setting she is considered likely to decompensate and present an even more imminent risk of harm to herself and others.

There is no reason to believe that Respondent's mental retardation will change. There is no reason to believe that her mental illness will change; her schizophrenia is a chronic condition. She is not currently able to care for herself outside a hospital setting and there is no reason to believe that she will improve significantly in the foreseeable future. The witnesses who have worked with her would not leave a child in her care. Her prognosis is poor based both upon her diagnosis and upon her history of non-compliance with treatment and medication. Her behavior is aggressive and bizarre, including self-injurious behavior and attacking others. She has been violent toward staff, ranting and raving, and has required seclusion. She becomes very agitated without warning and often without any apparent trigger.

* * *

It is true that [Mother] has not abused or neglected her children. They were removed from her care at birth and she has never been given a chance to abuse them

On these facts, the Court finds that [Mother] is incompetent to adequately provide for the care and supervision of these children due to the impairment of her mental condition. The Court further finds that her mental condition is likely to remain so impaired that it is unlikely she will be able to assume the care and responsibility for these children in the near future or ever.

¹ Peninsula is an in-patient mental health facility in Louisville, Tennessee.

² This is a reference to the Helen Ross McNabb Center in Knoxville, Tennessee which provides outpatient mental health treatment and support services.

(Numbering in original omitted; footnotes added).

In the case now before us, the trial court found that Mother's condition had not changed since the May 17, 2006 hearing. The trial court noted that Mother was released from Lakeshore on June 27, 2006; returned for two days in October 2006; was incarcerated for pending criminal charges until Child was born on March 29, 2007; and then returned to Lakeshore on March 30, 2007, where she remained at the time of the trial with no release date set. During Mother's most recent stay, she had made some progress by being moved from an acute care unit to a long-term program, but Mother was in the most restrictive setting in the long-term program and would not be permitted to participate in the on-campus day program in the foreseeable future. Finally, the trial court held that

[Mother] is not currently able to care for herself outside a hospital setting and there is no reason to believe that she will improve significantly in the foreseeable future; she has been violent toward staff and required seclusion; she becomes very agitated without warning and often without any apparent trigger. In the past week she assaulted a staff member although she apparently intended to hit another patient. She continues to carry the diagnoses of schizoaffective disorder and mild mental retardation. Although it is possible that she might be able to care for a child with help at some time in her life, that is not possible now or in the foreseeable future.

. . . . [T]he Court finds that [Mother] is incompetent to adequately provide for the further care and supervision of this child because [Mother's] mental condition is presently so impaired and is so likely to remain impaired that it is unlikely that [Mother] will be able to assume the care of and responsibility for the child in the near future.

Mother appeals the trial court's decision.

II. Issues Presented

The issues we review are whether the evidence preponderates against the trial court's findings by clear and convincing evidence that Mother was mentally incompetent to care for Child pursuant to Tenn. Code Ann. § 36-1-113(g)(8)(B)(i) and that termination was in Child's best interest pursuant § 36-1-113(g)(8)(B)(ii).

III. Analysis

A. Standard of Review

A biological parent's right to the care and custody of his or her child is among the oldest of the judicially recognized liberty interests protected by the due process clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79

(Tenn. 1993); **Ray v. Ray**, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). Although this right is fundamental and superior to claims of other persons and the government, it is not absolute. **State v. C.H.K.**, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004). This right continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination. **Blair v. Badenhope**, 77 S.W.3d 137, 141 (Tenn. 2002). Although “parents have a fundamental right to the care, custody, and control of their children,” this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute. **In re Drinnon**, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing **Stanley v. Illinois**, 405 U.S. 645 (1972)).

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger, “severing forever all legal rights and obligations of the parent.” Tenn. Code Ann. § 36-1-113(l)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” **M.L.B. v. S.L.J.**, 519 U.S. 102, 119 (1996) (quoting **Santosky v. Kramer**, 455 U.S. 745, 787 (1982) (Rehnquist, J., dissenting)). As a result, “[t]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.” *Id.* The constitutional protections of the parent-child relationship require certain safeguards before the relationship can be severed. **O’Daniel v. Messier**, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995). This most drastic interference with a parent’s rights requires “the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away.” **In re Swanson**, 2 S.W.3d 180, 188 (Tenn. 1999).

Termination proceedings are governed by statute in Tennessee. Parties who have standing to seek the termination of a biological parent’s parental rights must first prove at least one of the statutory grounds for termination. Tenn. Code Ann. § 36-1-113(c)(1). Secondly, they must prove that termination of the parent’s rights is in Child’s best interest. Tenn. Code Ann. § 36-1-113(c)(2). Because the decision to terminate parental rights has profound consequences, courts must apply a higher standard of proof in deciding termination cases. Therefore, to justify termination of parental rights, the party seeking termination must prove by clear and convincing evidence the ground (or grounds) for termination and that termination is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c); **In re Adoption of A.M.H.**, 215 S.W.3d 793, 808 (Tenn. 2007); **In re Valentine**, 79 S.W.3d 539, 546 (Tenn. 2002).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. **In re C.W.W.**, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000); **In re M.W.A., Jr.**, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, **State v. Demarr**, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., Aug. 13, 2003), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. **In re Valentine**, 79 S.W.3d at 546; **In re S.M.**, 149 S.W.3d at 639; **In re J.J.C.**, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder’s mind a firm belief or conviction regarding the

truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray*, 83 S.W.3d at 733; *In re C.W.W.*, 37 S.W.3d at 474.

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to either as to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's specific findings of fact are first reviewed and are presumed to be correct unless the evidence preponderates against them. We then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *In re S.M.*, 149 S.W.3d 632, 640 (Tenn. Ct. App. 2004). The trial court's conclusions of law are reviewed *de novo* and are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Termination under Tenn. Code Ann. § 36-1-113(g)(8)(B)(i) – Mental Incapacity

The trial court terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(8)(B) which provides:

The court may terminate the parental or guardianship rights of that person if it determines on the basis of clear and convincing evidence that:

(i) The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future; and

(ii) That termination of parental or guardian rights is in the best interest of the child;

Tenn. Code Ann. § 36-1-113(g)(8)(B).

No proof of willfulness on the part of the parent in the failure to care for Child is required to establish this ground. Tenn. Code Ann. § 36-1-113(g)(8)(C). The elimination of this requirement serves to protect children from harm caused by a parent who is incapable of safely caring for them. *In re D.C.C.*, No. M2007-01094-COA-R3-PT, 2008 WL 588535, at *9 (Tenn. Ct. App. M.S., filed

Mar. 3, 2008); *see also State of Tennessee Dep't of Children's Services v. Smith*, 785 S.W.2d 336, 338 (Tenn. 1990) (stating that “[o]nly where termination of parental rights is predicated upon the abandonment of the child by the parents has the legislature required the trier of fact to find that the acts of the parents were willful”). If willfulness were required in petitions based upon mental disability, “[a]n obvious result . . . is to condemn a child, whose parents are unfit to properly care for the child because of mental illness, to a life in serial foster homes without any possibility of a stable, permanent home.” *Smith*, 785 S.W.2d at 338.

The record shows that Mother suffers from a schizoaffective disorder and mild mental retardation. Mother has had a long history of mental problems necessitating multiple hospitalizations for treatment since she was 15 years old. She has been prescribed lithium, cogentin, zyprexa, and thorazine for her mental problems. She has had episodes of violent behavior and aggression resulting in periods of incarceration. She has been hospitalized in a mental health facility since Child's birth and has never been able to care for Child. Unfortunately, the prognosis for Mother is not good; there is no indication she will be able to care for Child in the foreseeable future. She is currently on the most restrictive level in the long-term care program at Lakeshore and will not be placed in the day program at any point in the foreseeable future. While at Lakeshore, she had to be secluded from other patients due to violent incidents. Mother is currently taking four psychotropic medications, which, according to the testimony of a Lakeshore psychological examiner, would be difficult for her to manage, as well as care for Child.

Mother offered no proof at trial. She argues on appeal that the trial court erred in allowing the testimony of Shawn Hassler, a senior psychological examiner at Lakeshore, as an expert witness because no proof was offered regarding Mr. Hassler's credentials, history, or educational background. Our review of the record indicates that Mother's counsel did not object to the introduction of Mr. Hassler's testimony at trial or question his credentials to testify as a witness. We find the issue has been waived because it was not raised in the trial court. “Issues not raised in the trial court cannot be raised for the first time on appeal.” *Sparks v. Metro. Gov't of Nashville*, 771 S.W.2d 430, 434 (Tenn. Ct. App. 1989) (citing *Irvin v. Binkley*, 577 S.W.2d 677 (Tenn. Ct. App. 1978)).

We conclude, as did the trial court, that there is clear and convincing evidence of Mother's incompetency to adequately provide for the care and supervision of Child because Mother's mental condition is so impaired and is likely to remain so that it is unlikely that she will be able to assume the care and responsibility for Child in the near future.

C. Best Interest of Child

Having found that the ground for termination was properly established under Tenn. Code Ann. § 36-1-113(g)(8)(B), we turn to the question of whether it was shown by clear and convincing evidence that it was in the best interest of Child that Mother's parental rights be terminated. This best interest analysis is required by Tenn. Code Ann. § 36-1-113(g)(8)(B)(ii).

Tenn. Code Ann. § 36-1-113(i) provides a list of factors for courts to consider in determining a child's best interest:

In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

In determining Child's best interest, the trial court held that Mother has not made adjustments in circumstance, conduct, or conditions as to make it safe and in Child's best interest to be in Mother's home; no relationship has been established due to Mother's mental illness and hospitalization since Child's birth; Mother's mental and/or emotional status would be detrimental to Child; and Child is currently flourishing in a prospective adoptive home with his two half-siblings.

The evidence does not preponderate against the trial court's finding, by clear and convincing evidence, that termination of Mother's parental rights is in the best interest of Child. Mother has been hospitalized for mental illness since Child's birth. Although since the time that Mother was admitted to Lakeshore, she has made some progress by moving from the acute care facility to the lowest level of the long-term care facility at Lakeshore, this slight change in Mother's status does not rise to the level of "such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of [Mother]." Tenn. Code Ann. § 36-1-113(i)(1). It does not appear that a lasting adjustment can be made in Mother's condition. Mother has no relationship with Child due to Mother's mental illness and hospitalization since Child's birth. Although there was no proof of neglect or abuse of Child by Mother, there was no opportunity for any since Child was removed at birth. Child was placed in and has been living with a foster family with two of his half brothers since his birth. Therefore, termination of Mother's parental rights would not cause a change of caretakers and physical environment and would have little impact on Child's emotional, psychological, and medical condition. Tenn. Code Ann. § 36-1-113(i)(5). The proof was undisputed that Mother could not care for Child at the time of trial or in the foreseeable future. Child was doing well in a foster home where he lived with his half-siblings. His foster family previously adopted Child's two half-brothers and have expressed a desire to adopt Child.

The legislature has provided that "[i]n all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child" Tenn. Code Ann. § 36-1-101(d). The General Assembly has decided that Child's need for a permanent, stable, and safe environment must outweigh a parent's interest in retaining parental rights where those two interests conflict. See *Smith*, 785 S.W.2d at 338. Since Child is currently flourishing in his foster home, we find that the court did not err in holding that termination of Mother's parental rights was in the best interest of Child.

Mother argues that termination is not in the best interest of Child because Mother has never been allowed to visit Child and was wrongly denied visitation under the restraining order because the court did not establish that visitation would endanger Child's physical or emotional health. This Court has previously held that "the development of a 'relationship,' without more, is an insufficient basis to support a finding that it is not in the best interest of [the minor child] to terminate his

parents' parental rights." *State of Tennessee Dep't of Children's Services v. D.G.B. and C.B.*, No. E2001-02426-COA-R3-JV, 2002 WL 31014838, at *10 (Tenn. Ct. App. E.S., filed Sept. 10, 2002) (no Tenn. R. App. P. 11 application filed). Furthermore, even without a court order preventing visitation, Mother's hospitalization and mental and emotional disabilities prevented Mother from visiting with her child, just as Mother's instability inhibited Mother's DCS case manager from visiting with her on all but two occasions.

Mother also contends that termination of her parental rights is not in Child's best interest because DCS is seeking reunification with the father, and termination of her parental rights will eliminate Child's right of child support payments from Mother. In addition to the requirements set forth in Tenn. Code Ann. § 36-1-113(i), this court has previously held that when deciding whether termination is in Child's best interests, the court should, in some cases, consider Child's loss of a legally enforceable right to future support from a parent. *C.J.H. v. A.K.G.*, No. M2001-01234-COA-R3-JV, 2002 WL 1827660, at *7 (Tenn. Ct. App. M.S., filed Aug. 9, 2002) (No Tenn. R. App. P. 11 application filed). However, this factor is not relevant in every case. *In re Audrey S.*, 182 S.W.3d 838, 880 (Tenn. Ct. App. 2005). In the present case, it is clear that Mother has no immediate or foreseeable ability to provide child support and refusing to terminate Mother's parental rights in the name of protecting an abstract legal right of Child to receive future monetary support from Mother would do nothing to advance the best interests of Child. At the time of the termination trial, Mother was hospitalized for the sixth time since the age of 15, and Lakeshore had no known plans to release her in the near future. In addition, Mother does not claim that she currently would be able to make child support payments, and with no foreseeable date of release from Lakeshore and nothing in the record suggesting that Mother's pattern will change in the future, we see no possibility that Mother will be able to provide child support to the father if he reaches the goal of reunification stated in the father's permanency plan. Thus, we find Mother's argument to be without merit.

IV. Conclusion

For the foregoing reasons, we affirm the judgment of the Juvenile Court. Costs of appeal are assessed to the appellant, D.M.P.

SHARON G. LEE, JUDGE